was injured by the fall of slate, was in a dangerous condition, and, if it was not timbered or taken down, some one would be injured or killed, but notwithstanding this warning the foreman failed to make any proper inspection of the roof, and directed plaintiff and his assistant to tear up the track in the haulway and relay it before they came out of the mine, during which operation the slate fell and plaintiff was injured, defendant was negligent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 209.]

2. Same—Contributory Negligence—Question for Jury.—Plaintiff and his assistant were ordered to tear up the track in the haulway of a mine, and relay it before coming out. They commenced the work when plaintiff heard something fall. He testified he thought it was caused by a "rat running around the gob." The substance which fell was about 10 feet from him, and, plaintiff knowing that this was an indication that the roof was unsafe, tapped the roof immediately above him to ascertain its condition, and, finding it safe at that point, continued his work without further examination either at the point from which the substance might have fallen, or in the direction he was about to work. Some two hours afterwards the slate fell which caused plaintiff's injury at a point 40 or 50 feet distant and near the face of the heading. Held, that plaintiff was not negligent as a matter of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1089-1132.]

3. Same—Assumed Risk.—Under the rule that an employee is not chargeable with risks which may be obviated by reasonable care on the master's part, and only takes the risk of the employment which cannot be so obviated, plaintiff did not assume the risk of such injury; it being the duty of the mine foreman to inspect the roof, and see that it was reasonably safe.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 557.]

CLINCHFIELD COAL CO. *v.* WHEELER'S ADM'R.

Sept. 10, 1908.

[62 S. E. 270.]

1. Master and Servant—Death of Servant—Action—Declaration.—Where a count in a declaration for the alleged wrongful death of a servant merely alleged that deceased was a miner, that he obeyed instructions to run defendant's motor and was killed, but there was no allegation touching the ways, appliances, and machinery that were unsafe, or by what means or in what way decedent was killed, such count was fatally defective.

2. Negligence—Action—Declaration.—It is not sufficient in a decla-

ration for an alleged negligent injury for plaintiff to allege that the injury resulted from defendant's careless and negligent conduct; but the facts relied on to establish the negligence must be stated with reasonable certainty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 182.]

3. Pleading—Amended or New Declaration.—Where plaintiff voluntarily abandoned his first declaration before there was any appearance, and had the case remanded to rules, a new writ issued, and filed a new declaration, after which defendant appeared and demurred and on this the parties went to trial, such second declaration could not be regarded as an amendment of the first.

4. Evidence—Opinion Evidence—Customs—Knowledge.—A witness was not competent to testify as to the usual custom touching the grade that ordinary traction or sprocket motors are run on where he testified that he did not know what the usual custom was, and his further examination showed that his knowledge of the subject, if any, was very limited.

5. Same—Acts of Others.—In an action for death of a motorman by jumping from the motor as it was descending a grade, evidence as to how other companies operated similar motors was inadmissible.

6. Appeal and Error—Review—Discretion of Court—Qualification of Witnesses.—A ruling allowing a witness to testify as an expert in the exercise of the trial court's discretion will not be reversed on appeal, unless it clearly appears that he was not qualified.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3852.]

7. Trial—Instructions—Weight of Evidence.—In an action for death of a servant, an instruction which did not confine plaintiff and the jury to the acts of negligence alleged in the declaration, and required a preponderating probability if it existed in the minds of the jury in order to justify a recovery, instead of requiring the jury to believe from the evidence, was erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 539-548.]

8. Master and Servant—Death of Servant—Actions—Proof Required.—In an action for death of a servant, defendant is not liable unless there is affirmative and preponderating proof of defendant's negligence.

[Ed.Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 954-977.]

9. Same—Appliances—Care Required.—A master was not required to provide a motor with brakes sufficient to guard the motorman against his own negligence.

10. Same—Evidence.—In an action for death of a motorman by jumping from the motor while descending a grade, evidence held in-

sufficient to sustain a finding that the motor was defective, or that defendant was negligent in providing a traction, instead of a sprocket, motor for use on the grade in question.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 958-968.]

11. Same—Assumed Risk.—Where decedent, a mature man, was placed in charge of defendant's traction motor at its mine used in hauling cars therefrom, and had been thoroughly instructed by an expert in the operation thereof, and had been directed to make repeated examinations of the motor and to report anything that might be wrong, he having operated the same many times up and down the road prior to the time he permitted it to get away from him, and jumped from the motor and was killed, he assumed the risk.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 581.]